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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/528,889	03/23/2005	Frank J. Viola	2865(203-3485)	9167

7590 04/20/2007  
Douglas E Denninger  
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EXAMINER
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SMITH, SCOTT A

ART UNIT	PAPER NUMBER
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3721

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	04/20/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

### Office Action Summary

Application No.

10/528.889

**Applicant(s)**

VIOLA ET AL

**Examiner**

**Scott A. Smith**

## Art Unit

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 20 March 2007.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-18 and 21-25 is/are pending in the application.  
4a) Of the above claim(s) 10-13 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-9, 14-18 and 21-25 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_.

## **DETAILED ACTION**

### ***Election/Restrictions***

Applicant's election of the species of Figs. 1 and 2 in the reply filed on 3/20/07 is acknowledged. Because applicant did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)). This election of species requirement is nonetheless moot since claims 19 and 20 have been cancelled.

Claims 10-13 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 5/2/06.

### ***Double Patenting***

Claim 23 is objected to under 37 CFR 1.75 as being a substantial duplicate of claim 2. When two claims in an application are duplicates or else are so close in content that they both cover the same thing, despite a slight difference in wording, it is proper after allowing one claim to object to the other as being a substantial duplicate of the allowed claim. See MPEP § 706.03(k). Perhaps claim 23 should be amended to depend from claim 22. In fact, claim 23 is herein examined below as if it depended from claim 22.

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

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Claims 22, 24 and 25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 22 recites a second curved portion...extending at a fixed angle with respect to the first longitudinal axis” on lines 5 and 6. How can a curve extend at a “fixed angle” as claimed? This appears to be inaccurate, and contradictory. It seems as though only a linear portion could “extend at a fixed angle”.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 22-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Tsuruta et al. '611.

Tsuruta et al. '611 discloses the stapler as claimed including a handle 1 having a manual actuator 6, an elongated member 2 having a first portion, a curved second portion 511, the second portion having an axis at an angle relative to the first portion, as best understood from the claims, a fastener applying mechanism 4, and a proximal actuator 24.

Claims 1-9, 14, and 22-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Green et al. '620.

Green et al. '620 discloses the stapler as claimed including a handle 30 having a manual actuator 40, 60, 90, an elongated member 120 having a first linear portion (adjacent 70b in Fig. 13), a second "linear" portion (adjacent 150 in Fig. 13), as broadly claimed, the second portion having an axis at a "fixed" angle relative to the first portion and fixed thereto, as broadly claimed, a fastener applying mechanism 200, cables 110, 112 for approximating the jaws and driving the staples. Green et al. '620 can be construed as having a "curved" second portion, as best understood of claims 22-25.

Claims 1-5, 7, 8, 14, and 22-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Clark et al. '871.

Clark et al. 871 discloses the stapler as claimed including a handle having a manual actuator, an elongated member having a first linear portion, a second "linear" portion, as broadly claimed, the second portion having an axis at a "fixed" angle relative to the first portion and fixed thereto, as broadly claimed, a fastener applying mechanism for approximating the jaws and driving the staples. Clark et al. '871 can be construed as having a "curved" second portion, as best understood of claims 22-25.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of

the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 1-5, 7, 8, 14-17, and 22-15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Viola et al. '616.

It would have been obvious to one skilled in the art to employ a linear staple cartridge to the stapler of Viola et al. 616 since such substitutions are well known and to do so provides no new and unexpected results. Viola et al. '616 lacks clear disclosure as to the angle of the elongated member portions, but do disclose the desirability of angling the portions to allow for greater tool versatility. Therefore, it would have been obvious to one skilled in the art to angle the portions of the stapler of Viola et al. '616 as claimed in order to accommodate preferred operating angles depending upon conditions, and since to determine such angles is within the engineering purview of the skilled artisan.

Claims 15-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuruta et al. '611, Clark et al. '871 or Green et al. '620.

Tsuruta et al, '611, Clark et al. '871 and Green et al. '620 lack clear disclosure as to the angle of the elongated member portions, but do disclose the desirability of angling the portions to allow for greater tool versatility. Therefore, it would have been obvious to

one skilled in the art to angle the portions of the staplers of Tsuruta et al. '611, Clark et al. '871 or Green et al. '620 as claimed in order to accommodate preferred operating angles depending upon conditions, and since to determine such angles is within the engineering purview of the skilled artisan.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620 in view of Green et al. '933.

Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 and Green et al. '620 lack the manually actuated knife, as claimed. Green et al. '933 discloses a knife 35 manually actuated by tab 140. In view of the teachings of Green et al. '933, it would have been obvious to one skilled in the art to provide the staplers of Tsuruta et al. '611, Viola et al. '616, Clark et al. '871 or Green et al. '620 with a manually actuated knife to effectively and directly the cutting of tissue.

### ***Response to Arguments***

Applicant's arguments filed on 11/24/06 have been fully considered but they are not persuasive. In general, applicants argue that the references fail to disclose a second linear portion extending at a fixed angle relative to the first linear portion. The Examiner disagrees. It is the Examiner's position that although most of the references should adjustable second portions, the second portions, once placed at the desired angle, are deemed to be at a "fixed" angle, as broadly claimed. Further, the portions are "linear", as broadly claimed.

***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Scott A. Smith whose telephone number is 571-272-4469. The examiner can normally be reached on 5:30-4:00 Tues.-Fri..


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rinaldi Rada can be reached on 571-272-4467. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

S. Smith



**SCOTT A. SMITH**  
**PRIMARY EXAMINER**